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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 655

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of HARRY M. GOLDBERG, deceased, and SOPHIE GOLDBERG, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

AGAINST

AMERICAN AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

PAGE

Citations 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

A. In General 3

B. The Evidentiary Basis for the Jury's Verdict 5

1. The Testimony of Claude and Forbes.. 5

2. The Actual Lewis Testimony—Its Lack of Credibility 7

REASONS FOR GRANTING WRIT:

POINT I.—The judicial pronouncement that wilful misconduct had not been established constituted an unwarranted intrusion into the jury's exclusive province and resulted in a denial of the constitutional right to a jury trial 8

POINT II.—The Courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness 16

POINT III.—Failure to comply with the provisions of the Warsaw Convention bars respondent from limiting liability thereunder 17

POINT IV.—The verdicts were not excessive and should not have been set aside 19

CONCLUSION 23

DEC 24 1957

236735

PAGE

APPENDIX:

Opinion of United States Court of Appeals for the Second Circuit 25

Opinion of United States District Court, Southern District of New York 32

CASES CITED

American Airlines v. Ulen, 186 F. 2d 529 12

Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F. 2d 77 16

Dyer v. MacDougall, 201 F. 2d 265 16

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 22

Gunning v. Cooley, 281 U. S. 90 10

International-Great Northern R. Co. v. Acker, 128 S. W. 2d 506 22

Jacob v. N. Y. City, 315 U. S. 752 10

Kaminski v. Chicago R. & I. Co., 200 F. 2d 1 15

Lavender v. Kurn, 327 U. S. 645, 652-653..... 9

MacKay v. Costigan, 179 F. 2d 125 15
Myers v. Pittsburgh Coal Co., 233 U. S. 184 10

N. L. R. B. v. Howell Chevrolet Co., 204 F. 2d 79 ... 16

Pekelis v. T.W.A., 187 F. 2d 122 13
People v. Tuczkewitz, 149 N. Y. 240 16

PAGE

Quok Ting v. U. S., 140 U. S. 417 16

Sonnentheil v. Christian Morelein Brewing Co., 172 U. S. 401 16

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29 8
Texas & P. Ry. Co. v. Riley, 183 S. W. 2d 991 22

Union Trust Co. v. Eastern Airline, October 1955 Term, #298 10

STATUTES CITED

Federal Rules of Civil Procedures, Rule 50(b) 2

United States Code, Title 28, Section 1254, (1) 2

United States Code, Title 28, Section 1332(a)(1) .. 2

Civil Air Regulation 61.3 (10) 14 CFR 696 4

Civil Air Regulation 61.301, 14 CFR 725 ..... 4, 11

Civil Air Regulation 61.310, 14 CFR 727 ..... 4, 11

Warsaw Convention:

Article 3 (1) (2) (49 U. S. Statutes 3015) 17

Article 3 (1) (c) 18

Article 3 (2) 18

Article 4 (4) 18

Article 9 18

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No. .....

DORIS SYLVIA GREY, infant, and HOWARD MARTIN GREY, infant, children of HARRY M. GOLDBERG, deceased, and SOPHIE GOLDBERG, deceased, by ESTHER WEINER, their guardian *ad litem*,

Petitioners,

AGAINST

AMERICAN AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioners, Doris Sylvia Grey and Howard M. Grey, infants, by their guardian *ad Litem,* Esther Weiner, pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered in the above entitled matter on November 30, 1955, affirming judgment of the United States District Court for the Southern District of New York setting aside jury verdicts in petitioners' favor.

Citations

The decision of the Court of Appeals for the Second Circuit affirming the order of the District Court setting aside jury verdicts in petitioners' favor in the aggregate amount of $90,000.00 and directing the entry of judgment

in favor of petitioners for $16,600.00 is reported in 227 F. 2d 282 (C. A. 2, 1955). The opinion of the United States District Court for the Southern District of New York granting respondent's motion under Rule 50(b) of the Federal Rules of Civil Procedures and setting aside the said jury verdicts is not reported and is annexed hereto. The decision of the said District Court denying petitioners' motion to strike from respondent's answer to limit liability under the provisions of the Warsaw Convention is reported in 95 F. Supp. 756 (D. C. S. D. N. Y., 1950).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 30, 1955. The jurisdiction of this Court is invoked under Section 1254, (1), Title 28, United States Code.

The jurisdiction of the District Court was invoked under the Authority of Section 1332 (a) (1), Title 28, United States Code.

Questions Presented

Petitioners seek a reversal of the determination of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Southern District of New York granting respondent's motion under Rule 50(b) of the Federal Rules of Civil Procedure and setting aside a jury's verdict in petitioners' favor in the aggregate amount of $90,000.00. The questions thus presented are:

1. Whether the extensive excursions into the relative credibility and probative weight of evidence by the Court below under the guise of a determination of legal sufficiency constituted an unwarranted intru-

sion into the jury's exclusive province and deprived petitioners of their constitutional right to a jury trial.

2. Whether the courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness.

3. Whether error was committed in denying petitioners' motion to strike Warsaw Convention defenses from respondent's answer thereby requiring petitioners to establish wilful misconduct rather than negligence.

4. Whether the jury's verdicts were excessive and should have been set aside.

Statement of the Case

A. In General

Suit was brought under the Death Statutes of the State of Texas to recover for the wrongful death on November 29, 1949 of the parents of the infant petitioners, while passengers on one of respondent's flights.

The flight emanated at LaGuardia Airport, New York City, destined for Mexico City, Mexico, with regularly scheduled stops at Washington, D. C., Dallas, Texas and Mexico City, Mexico. The plane crashed at Love Field, Dallas, Texas, killing 28 of the 46 persons aboard, at about 5:30 A.M. on November 29, 1949 while the Captain was flying up and around for a second landing approach. The Captain, First Officer and Flight Engineer survived the crash and testified at the trial.

A jury, at the conclusion of an eight day trial, found that the wilful misconduct of the co-pilot Lewis was a substantial contributing cause of the accident. The jury

found that while the Captain was in personal command, Lewis without authorization or knowledge of the Captain, contrary to Civil Air Regulations,* assumed control of the plane, failed to carry out his superior's command to retract the flaps to take off position, feathered one of three functioning engines, and caused the plane to crash. The jury found that the junior officer substituted his judgment for that of the pilot whom he did not consider to be competent. Implicit in the jury's verdict is a finding that Lewis was deliberately attempting to bring the plane in for a crash landing at the very moment the Captain was taking the plane up and around for a new landing approach.

The jury accepted the testimony of Captain Laurens Claude and that of the Flight Engineer, William F. Forbes, and rejected that given by the Co-Pilot Robert E. Lewis.

---

*Civil Air Regulation 61.3 (10) 14 CFR 696

"* * * (10) Pilot in command. Pilot in command shall mean the pilot responsible for the operation and safety of the aircraft during the time defined as flight time."

Civil Air Regulation 61.301, 14 CFR 725

"Command of flight. The pilot in command shall be in command during the flight of the aircraft."

Civil Air Regulation 61.310, 14 CFR 727

"Emergency decisions. The pilot in command is authorized, in emergency situations which require immediate decision and action, to resolve upon a course of action which is required by the factors and information available to him. He may, in such situations, deviate from prescribed methods, procedures, or minimums to the extent required by considerations of safety. When such emergency authority is exercised, the pilot shall, to the extent possible, keep the proper control station fully informed regarding the progress of the flight. He shall submit a written report of any such deviation to his operations manager. The operations manager shall furnish a copy of such report, with his comments, promptly to the Administrator."

B. The Evidentiary Basis for the Jury's Verdict

1. The Testimony of Claude and Forbes

The flight had progressed without incident from Washington, D. C., to the vicinity of Nashville, Tennessee, when the outboard engine on the port wing, sometimes referred to as the No. 1 engine, developed difficulty. As a result, it was feathered (192a) and shut off.* Approximately two and one-half hours later, the plane reported in range of Dallas and was cleared to land. Shortly before the plane reached the airport, the Flight Engineer noted that the fuel flow gauge for the outboard engine on the starboard side, the No. 4 engine, read zero and so advised the Captain (211a, 314a). At this point the plane was properly aligned with the runway and preparing to execute a routine landing. The Captain immediately ordered the fuel booster pump applied to the No. 4 engine (212a) which caused the No. 4 engine to surge or overspeed, and the left wing to dip fifteen to twenty degrees (212a-213a). The plane turned to the left as it crossed the end of the runway (214a, 215a).

The Captain reduced power on the starboard side, increased the power in the No. 2 port engine and brought the plane to a level position to the left of the runway (214a). Full power was then applied in all engines and the flaps and gears were ordered up for another approach (216a). This was all done in accordance with normal procedure. At this point the plane had progressed approximately 800 feet beyond the edge of the runway and was at an altitude of 30 to 40 feet (216a) and climbing. The plane continued to climb until it crossed the No. 7

*On the preceding flight another Captain noted that the No. 1 engine repeatedly backfired and trailed black smoke. This was not noted on the log sheet, as was required (App. 271a, 411a). This defective condition was not known to Captain Claude.

runway, a distance of more than two-thirds the width of the field (221a), to a height above the hangars when it stalled and started to settle (217a). The left wing tip hit the northeast end of a hangar and the plane crashed. The Captain testified affirmatively that the No. 4 engine was developing power at all times. The Captain never gave any order to feather the No. 4 engine (219a) and both he and Forbes were unaware that it had been cut out (219a, 332a). The Captain testified that it was Lewis' action that caused the crash in cutting off the No. 4 engine (222a).

An examination of the No. 4 engine and the booster pump following the accident by the respondent's experts found them in good running order (116a, 117a, 119a).

Forbes testified that there was adequate fuel available in the No. 4 tank at all times (75a). He acknowledged that the gears and flaps had been extended by him on order of the Captain before he noted that the No. 4 fuel pressure gauge read zero (79a). He immediately advised the Captain of this fact and was directed to apply the booster pump (80a). The Captain then directed the co-pilot to retract the gears and to raise the flaps (80a, 331a). Forbes saw Lewis turn the gear handle to the up position but did not note what action Lewis took, if any, in relation to the flaps (81a). Forbes testified affirmatively that no order was given to feather the No. 4 engine (332a). He was not aware that it had been shut off. There was a time interval of between thirty seconds and one minute between the order to retract the gears and raise flaps and the crash (316a). It is apparent from Forbes' testimony, and the jury so found, that the plane was not in *extremis* until the No. 4 engine was shut off.

2. The Actual Lewis Testimony—Its Lack of Credibility

The testimony of the co-pilot is materially different from that given by the Captain Claude and was necessarily rejected by the jury in its entirety.

The co-pilot Lewis, stated that the No. 4 engine developed difficulty when the plane was approximately ½ mile from the field (336a) after the flaps and gears had been fully extended (168a) and as the plane was preparing to execute a three engine landing. Air speed was 155 miles per hour and the altitude 600 to 700 feet. When the plane was between 1500 and 2000 feet inside of the boundary of the field and a few hundred feet to the left of the runway the left wing dipped (169a). The Captain immediately ordered full power for a go-around and the plane leveled off. This order was executed by the co-pilot who simultaneously retracted the gears. At this point the plane, according to Lewis, was at an altitude of between 20 to 50 feet (170a). The co-pilot denied that he heard the Captain's order to retract either the gears or the flaps (169a, 340a)—a command heard by Forbes (315a, 79a). It is significant to note that the distance between the Captain and co-pilot was about two feet with Forbes seated immediately between them and slightly to the rear, and just a "matter of inches" away (331a).

Lewis testified that after full power had been ordered he feathered the No. 4 engine on his own responsibility and without advising the Captain (170a-171a). Simultaneously, he radioed the tower that the plane was lost. By this time the plane had progressed 800 to 1000 feet further over the field (171a).

By way of explanation the co-pilot testified that the tachometer indicated that the No. 4 engine was not developing power (341a) thereby creating an aerodynamic drag (179a).

He contradicted himself by further stating that the plane was in a climbing left stall immediately before he feathered the No. 4 engine—an evident impossibility if power was not being generated from the right side. He acknowledged that the flaps had not been retracted from full braking position (168a).

Lewis concluded his testimony by stating that he did not consider Captain Claude to be competent (371a), a belief not shared by the jury.

REASONS FOR GRANTING WRIT

POINT I

The judicial pronouncement that wilful misconduct had not been established constituted an unwarranted intrusion into the jury's exclusive province and resulted in a denial of the constitutional right to a jury trial.

The authorities are legion that it is the jury's, and not the Court's, function to weigh evidence. Similarly the jury is the sole and exclusive judge of credibility. Courts are not free to substitute their judgment for the factual findings of a jury merely because the Court might have come to a contrary conclusion. It is only where there is no evidence of substance upon which reasonable men might base a determination that a Court may intervene.

In *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, this Court reaffirmed this principle and held:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain references. The focal point

> of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most desirable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co.,* supra, 68; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored" (p. 35).

The basic issue presented in this application was before the Court in *Lavender* v. *Kurn,* 327 U. S. 645, 652-653, where a jury verdict was reinstated in a wrongful death action. The critical question was whether the decedent was murdered or killed by a mailhook protruding from one of defendant's trains. The opinion of the Court notes:

> "* * * The jury having made that inference the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury * * *.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute

> by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also: *Jacob* v. *N. Y. City*, 315 U. S. 752; *Gunning* v. *Cooley*, 281 U. S. 90; *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184.

This Court, in an analogous situation, *Union Trust Co.* v. *Eastern Airline*, October 1955 Term, #298, decided December 5, 1955, granted certiorari and simultaneously reversed the judgment of the United States Court of Appeals for the District of Columbia.

In this case, the trial court was meticulous in setting forth the applicable law in its charge to the jury. After the verdict was returned, it then unexplainably ignored its own instructions and set aside the jury's verdict. In so doing the Court in its opinion wandered through the record, selecting at random that which it chose to believe or rely upon and usurped the jury's prerogative.

The trial court conceded that the jury had the right to accept the testimony of Claude and Forbes, that the No. 4 engine was developing power and reject Lewis' claim that

it was windmilling.* It went further however and erroneously held that the pre-empting of the Captaincy by Lewis knowingly and contrary to Civil Air Regulations, is insufficient to base a finding of wilful misconduct. The Court erred when it ruled that petitioner was required to reject by affirmative testimony Lewis' explanation for his action in feathering the No. 4 engine. This would be tantamount to absolutely accepting Lewis' claim that he had used his best judgment in an attempt to save the plane, unless contrary intention were affirmatively and directly proved. Such a proposition violates the most elementary propositions of the law of evidence.

The trial court in setting aside the verdicts noted in part that:

> "* * * Flight Officer Lewis admitted that Captain Claude was in control of the plane on the approach to Love Field; that the No. 1 engine had been feathered previously. He was aware of Civil Air Regulations which specified that the Captain was in command of the flight** and was authorized to make decisions in an emergency† nevertheless, he took it upon himself to feather the No. 4 engine at a time when he knew Captain Claude was following emergency procedure for a go-around."

---

*Respondent's witness, Captain Sperry, testified that a windmilling propeller would create a "tremendous drag" and have an anchor-like effect on the right side (262a-263a). This would have forced the plane to go to the right. However, Lewis' own flight plan (424a) has the plane going to the left at all times, a fact which was conceded.

**Reg. Sec. 61.301, 14 CFR 725.

†Reg. Sec. 61.310, 14 CFR 727.

The trial court concluded:

> "As between Claude and Lewis, the jury could have believed Claude that the engine was developing power and not windmilling. Of course, resolving this issue in favor of Claude does not justify a finding of wilful misconduct.
>
> *"There would be required, in addition, a rejection of Lewis' explanation of his action."*

Continuing the Court said (App. 25a):

> "Therefore, if the jury based its verdict upon Lewis' violation of the Civil Air Regulations in preempting the Captain, the evidence was insufficient to find wilful misconduct. It may not be said that Lewis' feathering of the No. 4 engine—*a violation though it is,* was performed knowing that it would probably result in injury or was performed in such manner as to imply a reckless disregard of its consequences. *From the undisputed evidence* he used his judgment in an attempt to save the plane and this is not, under circumstances, wilful misconduct." (Emphasis supplied.)

The fallacy of this point is that the Court confuses intent with motive. Lewis' acts were intentional, deliberate and knowingly performed, and therefore were wilful. Since his acts violated the Civil Air Regulations they constituted misconduct and it follows that his wilful misconduct was established as a substantial contributing factor to the accident. cf. *American Airlines* v. *Ulen,* 186 F. 2d 529 (C. A. D. C. 1949). This is especially so as the jury found that no split second decisions were involved.

The jury found that Lewis did not use his "judgment in an attempt" to save the plane but deliberately, knowingly and contrary to specific command attempted to crash

land and thereby brought about the plane's destruction. Wilful misconduct, as this term is employed in the Warsaw Convention, does not require knowledge on the part of Lewis before the event that the plane would crash and that 28 of the passengers would perish.

The opinion of the Appellate Court below correctly defined the term wilful misconduct as follows:

> "The instructions required proof of 'a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.' This was in accordance with precedent. *American Airlines* v. *Ulen*, 186 F. 2d 529 (D. C. Cir. 1949); *Pekelis* v. *T.W.A.*, 187 F. 2d 122 (2 Cir. 1951); *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105 (1952), aff'd 305 N. Y. 830, certiorari denied, 346 U. S. 874."

It is apparent from a gleaning of this definition that petitioners were not required to prove that Lewis was possessed of a suicidal intent or that he was clairvoyant and could foretell with exactness what the outcome of his mutinous actions would be. What is obscure is the basis of the Court's apparent reversal of the holding of the *Pekelis* case, while citing it with approval in its definition of wilful misconduct. In the *Pekelis* case a mechanic performed a test "used by most mechanics" instead of the required one. The Court clearly indicated that it was for a jury to determine whether on the basis of this evidence the mechanic knew that this violation was likely to cause injury to a passenger. *Pekelis* v. *T.W.A.*, *supra*.

The verdict of the jury is fully supported by competent proof that:

1) Lewis was attempting, contrary to the orders of his captain, to bring the plane in for a crash landing with the gears up and the flaps in a full braking position;

2) Lewis was fully aware that the feathering of the No. 4 engine would commit the plane to a crash as only two engines would be developing power;

3) Lewis acted intentionally because he considered his Captain to be incompetent;

4) Captain Claude was an experienced qualified pilot with over twenty years' experience and with 20,000 hours flying time; co-pilot Lewis was not qualified to pilot a DC-6 and had only qualified in 1947 as a two-engine pilot;

5) The plane was, in fact, climbing with full power in three engines for a go-around and had risen above the level of the hangars when the No. 4 engine was feathered;

6) There was no aerodynamic drag created by the No. 4 engine;

7) The plane was not, contrary to the opinion of the Court of Appeals, in *extremis* until Iewis feathered the No. 4 engine;

8) No split-second situation was present, as claimed by Lewis, as there was an interval of upwards of one minute between the time Forbes noted a zero reading of the No. 4 fuel gauge and the crash;

9) Lewis contradicted himself when he admitted the plane was going to the left since this could be accomplished only by power developing from the starboard No. 4 engine;

10) Lewis lied when he testified that he did not hear the Captain's order to raise the gears and flaps to take-off position;

11) Lewis' failure to sing out that he was feathering No. 4 engine was consistent with his plan to disobey the Captain's instructions; otherwise, the natural thing would have been for him to yell out and warn the Captain;

12) Lewis' explanation was not worthy of belief and was the product of afterthought.

Only where no possible view of the evidence, considering it with all reasonable inference most strongly against respondent and in favor of petitioners, may judgment notwithstanding the verdict be entered. The Court of Appeals in its opinion recognized that rule by stating that the jury's finding of wilful misconduct could only be disturbed "if, on no possible view of the evidence, could reasonable men reach that conclusion". The Court then reviewed the facts and noted:

> "If defendant had the burden of proving that there was no wilful misconduct on the part of any member of the crew, we think a jury would have been warranted in finding on this record that the burden had not been sustained. * * * "

From this it would appear that viewing the evidence most strongly against the petitioners and in favor of the respondent, as the Court erroneously did, at best the scales were equally balanced. Quite clearly the Court itself was weighing evidence. This constituted error. If there was *any* evidence which would sustain the verdict, the motion for judgment absolute must be denied. *MacKay* v. *Costigan*, 179 F. 2d 125; *Kaminski* v. *Chicago R. & I. Co.*, 200 F. 2d 1. If the Court could weigh evidence then there was sufficient in the record to compel a denial of the respondent's motion.

POINT II

The Courts below erroneously bound the jury to accept a so-called uncontroverted explanation of a discredited interested witness.

The Courts below recognized that implicit in the jury's verdict was a finding in favor of the plaintiffs' version of the crash as testified to by Claude and Forbes. The Courts below however, ruled that petitioners were required additionally to reject Lewis' explanation for his wrongful actions by affirmative testimony.

It has long been recognized that where the credibility of an interested witness has been impaired a jury may reject any part or all of the witness' statements even where they are not directly contradicted. *Quok Ting* v. *U. S.*, 140 U. S. 417; *Sonnentheil* v. *Christian Morelein Brewing Co.*, 172 U. S. 401. *Broadcast Music Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d 77 (C. A. 2, 1949); see also *N. L. R. B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C. A. 9, 1953); *Dyer* v. *MacDougall*, 201 F. 2d 265 (C. A. 2, 1952); *People* v. *Tuczkewitz*, 149 N. Y. 240 (1896).

Lewis was well aware that it was the petitioners' claim that his wilful misconduct caused the crash of the respondent's aircraft and the death of 28 passengers. Lewis is an employee of the respondent. His position and future advancement with the respondent, it can be assumed, depended upon the jury's finding. It is therefore, apparent that Lewis had a motive to conceal his true actions from the jury. The elementary rules of evidence dictate that where, as here, an interested witness' testimony has been rejected in all material respects by the trier of the facts, it would be folly to rule that the witness' explanation must be allowed to stand as truthful. Uncontradicted testimony

cannot be withdrawn from a jury's scrutiny where serious questions of credibility have been raised as to an interested witness' testimony. In so doing the courts below further departed from their function and invaded those of the jury.

POINT III

Failure to comply with the provisions of the Warsaw Convention bars respondent from limiting liability thereunder.

Article 3 of the Warsaw Convention (49 U. S. Statutes 3015) provides as follows:

> "Article 3. (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this conven-

> tion. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

It is conceded that the air passenger tickets issued to the petitioners' parents did not set forth the agreed stopping places as provided in Article 3 (1) (c). The question thus presented as stated by the District Court is "whether Article 3 (2) means that unless a ticket with all the particulars as set forth in Article 3 (1), is delivered, the carrier's liability is unlimited" (95 F. Supp. 756, 758).

An examination of Articles 4 (4) and 9 reflect that the draftsmen of the Warsaw Convention denied carriers the right to limit liability where baggage checks and waybills did not strictly conform to the articles of the Convention. The District Court alluded to these provisions but concluded that since specific provision denying protection to the carrier was contained therein but omitted from Article 3, that therefore the draftsmen did not intend to deny the protection of limited liability for non-compliance. The provisions of the Convention are in derogation of the common law and must be strictly construed against the carrier. In light of the foregoing, strict compliance with all the terms and requirements of the Warsaw Convention should be a condition precedent to a limitation of liability.

It is inconceivable that the draftsmen of the Convention ever intended to require the carrier to exercise a greater degree of care when dealing with baggage and cargo than with passengers.

Article 3 was intended to advise passengers of the jurisdictions under which they might become subject and the

number of landings and take-offs in advance of the flight. This is of importance when it is borne in mind that the hazards of air travel are greatest during take-off and landing. A passenger should be apprised of those places where the plane will stop to give to him an opportunity to consent to his becoming subject to the laws of foreign jurisdictions. Similar notification should be given to a passenger flying from New York to Mexico City with relation to domestic landing and take-offs as the laws of the several states are materially different.

Any other conclusion would do violence to the mandatory language in Article 3 that the ticket "must" and "shall" contain these particulars.

POINT IV

The verdicts were not excessive and should not have been set aside.

The verdicts returned by the Jury are as follows:

For the Death of Harry M. Goldberg
Howard M. Grey.....$50,000.00
Doris Sylvia Grey.... 30,000.00

For the Death of Sophie Goldberg
Howard M. Grey.....$5,000.00
Doris Sylvia Grey..... 5,000.00

The trial court set aside these verdicts as excessive inso far as they exceeded the sum of $8,300. as to each decedent and ordered a new trial only in the event the judgment setting aside the verdicts under Rule 50(b) was reversed.

The applicable criteria for determining damage under Texas Law were correctly stated by the trial court in its opinion (29a).*

Petitioners' father, Harry M. Goldberg, was 47 years of age at the time of his death and had a life expectancy of 23.08 years. He was employed as head of production (246a) of a leading national advertising agency where he had worked continuously for a period of 32 years (248a). He received a salary of $12,500.00 per year (248a) and as a stockholder of the firm received a share of the profits. At the time of his death his 5-year accumulation in the profit-sharing plan totalled $5,861.49 (249a). He was in excellent health and was one of the top production men in the advertising field. In all probability he would have been made a vice-president of the company with an increase in salary and a greater participating interest in the profit-sharing plan (251a).

The petitioners' mother Sophie Goldberg was a 42 year old housewife at the time of her death with a life expectancy of 26.72 years. She was a retired school teacher and was in excellent health (56a).

The petitioners resided with their parents in a private home purchased by their parents in 1940. They were "a very devoted and closely-knit family" (52a).

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*"I charge the jury that in awarding damages they should take into consideration the following:

1. Pecuniary loss of contributions of each parent for support, education and so forth during minority.

2. The value of the services which each parent might and would have rendered in training and educating the children during minority.

3. The loss of reasonable contributions each child might receive after majority from the parent.

4. The loss of prospective accumulations of the parent during his or her lifetime" (29a).

The petitioner Howard M. Grey was 17 years of age at the time of his parents' death. He was enrolled in a pre-Medical course at the University of Pennsylvania having previously been graduated from Horace Mann High School. His tuition and all of his expenses had been paid by his father. At the time of the trial he was attending New York University School of Medicine.

The financial demands upon the parents of a medical student are great. They are required to contribute not only toward his support and medical school tuition but also to his support during internship, residency and during the infancy of a private practice. In many instances they are called upon to bear the expense of post graduate study and research. Under the circumstances reasonable men could find that the cost of such medical education alone would have amounted to approximately $25,000.00.

The petitioner Doris Sylvia Grey was twenty years old at the time of her parents' death. She had attended private schools, all of the expenses for which had been paid by her father (241a). She was engaged to marry a young man with her parents' knowledge and consent (240a) at the time of the accident and after the accident was married in February 1950. Her husband was not self-supporting and was studying podiatry. At the time of the trial he was working as a laboratory assistant at a local hospital (240a).

An award of $35,000.00 to the petitioner Doris Sylvia Grey was reasonable and proper. The jury had a right to conclude that her father would have advanced in his employment with resultant increases in salary and in his participation in the profit-sharing plan. Her father's firm was not a small local advertising agency,—it employed 650 people and maintained offices in several of the large cities throughout the country. Her father had not reached the peak of his business or earning capacity.

The verdicts are not in conflict with Texas law. Wide latitude must be given to the jury and its determination must stand "unless the amount assessed admittedly reflects the unfriendly feelings and unworthy motives * * *." *International-Great Northern R. Co.* v. *Acker,* 128 S. W. 2d 506. Court of Civil Appeals of Texas.

In *Texas & P. Ry. Co.* v. *Riley,* 183 S. W. 2d 991, the Court of Civil Appeals of Texas refused to set aside a $30,000 verdict as excessive for the death of a 35 year old railroad employee who was earning $125 per month plus board and lodging. There, as in the instant case, the proof was that deceased took pride in his family and had a keen interest in his children's education. After alluding to these facts, the Texas Court held that the verdict was not excessive and said in part:

> "* * * Under all the circumstances here we are not prepared to say that the damages assessed are excessive. Certainly there is no fact in this record to show that the jury was activated by any ulterior motive in making this assessment. Appellee's measure of damages was great and it must be remembered that it did not depend solely upon monetary contributions by the deceased husband and father" (p. 995).

Ordinarily this Court will not review the discretionary action of the trial court in either granting or denying a motion for a new trial; *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474. In this instance however, the trial court ruled that there was no factual basis for the awards. The least that can be said is that the opinion of the Court suggests a predisposition against the jury system as this is the final attempt by the trial court to preempt the jury's lawful function. Here the trial court did not exercise discretion in reversing the facts, rather it ruled

as a matter of law that facts were absent which the record clearly belies. It cannot be said on this record that the jury was acting out of sympathy in awarding the petitioners a verdict in the aggregate sum of $90,000.00 in 1954 for the loss of two comparatively young parents.

CONCLUSION

The decisions below represent a gross and an alarming departure from our constitutional jury tradition. They are apparently grounded upon the apparent indifference to the jury's exclusive province of weighing evidence and resolving credibility. The supervisory jurisdiction of this Court should be exercised so as to prevent and discourage this growing practice.

For the foregoing reasons this petition for certiorari should be granted, the judgments below reversed and the verdicts reinstated.

Respectfully submitted,

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